New Jersey Board of Public Utilities

Petitions For Approval Of A Merger, Consolidation, Acquisition And/Or Change In Control

N.J.A.C. 14:1-5.14(a) through (d)

17 May 2006

BOARD OF PUBLIC UTILITIES

Standard of Review of Petitions for approval of a merger, consolidation, acquisition and/or change in control

Adopted Amendments: N.J.A.C. 14:1-5.14(a) through (d)

Proposed:	December 19, 2005 at 37 N.J.R. 4887(a)
Adopted By:	Board of Public Utilities, Jeanne M. Fox, President, and Frederick F. Butler, Connie O. Hughes, Joseph L. Fiordaliso and Christine V. Bator, Commissioners.
Filed:	_____, 2006 as R. ____d._____ without change.
Authority:	N.J.S.A. 48:2-13, N.J.S.A. 48:2-51.1, N.J.S.A. 48:3-7, N.J.S.A. 48:3-10, N.J.S.A. 48:2-23 and N.J.S.A. 48:2-21

BPU Docket Number:	AX05080742
Effective Date:	May 1, 2006
Expiration Date:	September 19, 2007

The New Jersey Board of Public Utilities (Board) is herein adopting amendments to its rules regarding procedures for approval of a public utility merger or consolidation, found at N.J.A.C. 14:1-5.14.

These rules were originally adopted at 34 N.J.R. 3639(a) effective September 19, 2002 and will expire if not readopted on or before September 19, 2007, pursuant to N.J.S.A. 52:14B-5.1(c).

The proposed rule amendments were published in the New Jersey Register on December 19, 2005 and comments were accepted through February 17, 2005. Additionally, a public hearing was held on February 7, 2006 at the Board to afford members of the public the opportunity to place oral comments on the record.

Six persons submitted timely comments, which are summarized below, with the Board's responses. To view the record from the public hearing, feel free to contact the Board's Office of Case Management at (973) 648- 2026.

Summary of Public Comments and Agency Responses:

1. Roger E. Pederson, Atlantic City Electric Company ("ACE")
2. Fred S. Grygiel ("Grygiel")
3. Ev Liebman, New Jersey Citizens Action ("NJCA")
4. Christine M. Juarez, State of New Jersey Division of the Ratepayer Advocate ("RPA")
5. Ira Megdal, South Jersey Gas Company ("SJG")
6. Richard A. Chapkis, Verizon New Jersey, Inc. ("Verizon NJ")

1. COMMENT: (ACE) We are not disputing that the Board has authority to approve the types of transactions outlined in the proposed amendments. However, it takes issue with the way the Board is proposing to apply the positive benefits test. As the Board states in the summary to the proposed amendments, it has long conducted a case-by-case review and has used either a "no harm" standard or a "positive benefits" (otherwise known as a "best interests of the public") standard of review. The positive benefits test is not mandated by the applicable New Jersey statutes (see N.J.S.A. 48:2-51.1 and N.J.S.A. 48-3-7) and is generally considered to be a discretionary test of the Board. Although the Board has applied a positive benefits test at times in the past, the new standard as proposed is a fundamental shift in past practice and unnecessarily creates serious issues.

   The most serious issue with the proposed amendment is that the proposed amendments require that petitioners prove, by a preponderance of evidence, that there are no negative impacts for each of four different criteria, including affects on competition, rates, employees and safe and adequate service. This requirement could have unintended consequences and could harm the New Jersey economy in the long run. If the positive benefits test, rather than a "no harm" standard is to be used , then at the very least, it should be viewed on a "net benefits" basis. As the proposed amendments are currently written, if any intervener were able to establish that there will be an adverse impact on, for example, employees in New Jersey, even if there is abundant proof that there will be vast benefits related to affects on competition, rates and safe and adequate service, a proposed merger would be quashed. In this example, a potentially negative effect on New Jersey employees could be argued if we were able to show significant synergies (which usually are accomplished by reducing duplication in positions), which would have a significantly positive effect on rates.

   Moreover, because of the difficulty in meeting the standard of proof with respect to no adverse impacts for each of the four stated criteria, the amendments as

proposed could have the unintended effect of discouraging investment in the State's utilities. Investors are critical to provide utilities with the sources of capital required for the significant infrastructure investments necessary to maintain and enhance service to New Jersey consumers. By unnecessarily increasing the difficulty of justifying that a merger will be good for New Jersey, the proposed amendments could discourage investment in New Jersey utility companies. The Board should apply a "net benefits" approach, rather than requiring proof that benefits flow with respect to each of the four stated criteria.

RESPONSE: Although the primary concern expressed by the commenter is that the proposed amendments require that petitioners prove, by a preponderance of evidence, that there are no negative impacts for each of four different criteria, including affects on competition, rates, employees and safe and adequate service, this part of the standard is not different from the "no harm" standard supported by the commenter and utilized by the Board in response to various petitions in the past. Historically, the Board generally has not granted merger approvals without, at minimum, a finding that competition, rates, employees and safe and adequate service would each overall not be harmed. Stated another way, even under the "no harm" standard, the Board historically has not approved a merger without recognizing that synergies might result in reductions in force, but finding that overall employees would not be harmed or negatively impacted. This aspect essentially would remain unchanged under the amended rule. The amended rule makes clear and provides both petitioners and the regulatory community with regulatory certainty that positive benefits must flow to customers and the State of New Jersey and that merely demonstrating "no harm," absent some showing of positive benefits, will no longer be sufficient.

With respect to the commenter's concerns about discouraging investment in the State's utilities, the Board does not believe there to be a legitimate concern about discouraging utility investment. On the contrary, a codified "positive benefits" standard will require petitioners to provide documentation that the transaction will not only have no adverse impact, but that it will benefit New Jersey customers and benefit the greater public of New Jersey by ensuring that these transactions are performed so as to maximize the positive impact on the State's economy. Moreover, the Board continues to have ample statutory authority over the provision of safe, adequate and proper utility service such that it will continue to ensure that required infrastructure investments necessary to maintain and enhance service to New Jersey ratepayers are made.

2. COMMENT: (Grygiel) These comments are being filed together with comments related to the Board's diversification restriction rule proposal based upon my conviction that the cases are clearly related and should be considered by the Board together as part of its ongoing regulatory concerns caused by the consolidations in the electric and gas industries in New Jersey, and the resulting dominance of holding company structures in the State. A similar trend is ongoing in the rest of the country as reflected in the announcement today in The New York Times of further consolidations, "Long Island Power Utility Up For Sale." One of the

potential bidders is Consolidated Edison that already owns New Jersey utility Rockland Electric. The article notes that there are a number of very large energy mergers pending most notably the Exelon-PSEG, FPL Group-Constellation Energy Group and Duke Energy-Cinergy deals.

The Board is in the process of assessing whether its current statutory authority is sufficient to adequately protect ratepayers in New Jersey's electric and gas industries that are characterized by in-state and multi-state holding companies owning all of the New Jersey utilities. Further, the Board is also trying to determine if the recent repeal of the PUHCA 1935 leaves a hole in the protective regulatory fabric that could lead to new exposures of ratepayers to potentially damaging spillovers from the related non-regulated subsidiaries of their parent Holding Companies. Lastly, some of the parent holding companies themselves are engaged in regulated activities in other states that could lead to greater risks and potentially higher rates for their related New Jersey utilities.

With specific respect to the "positive benefits" rule proposal, the complex regulatory issues associated with these industry structures must be confronted by the BPU and resolved in a way so as to assure that New Jersey ratepayers have access to safe, adequate and reasonably priced energy services. Although the Board has in the past used the "no harm" standard in judging whether a proposed merger/acquisition should be approved as in the public's interest and some have argued that the application of the "positive benefits" test is really not much different after all is said and done than the "no harm" test, I would urge the Board to reject that proposition and begin a new era in merger/acquisition review wherein the joint petitioners would bear a larger burden to demonstrate that approval of these complex, costly and contentious cases will benefit ratepayers, employees and other stakeholders of the New Jersey utility. The focus has to shift from the synergies of the holding company to the financial and operational integrity of the utility.

The joint petitioners should be compelled to provide in their petitions a quantitative estimate of the benefits and costs of the merger/acquisition for a specified period of time following the filing. Generally the filings come to the Board months after the companies have agreed to a deal and then it becomes the BPU's burden to evaluate the studies/analyses and determine if the test has been met. It is time for the companies to accept this new burden of proof to quantify rather than just characterizing the expected benefits and costs in the filing. The companies typically spend tens of millions of dollars on studies/opinions to justify the transaction to their respective Boards of Directors. Further, these transactions will trigger a variety of change in control payments and other financial benefits to senior management of the companies. To the best of their ability, the petitioners should provide these costs in a clear and separate section of the filing to the Board that would become a standard element under the "positive benefits" test. As it stands now the parties have to engage in detailed discovery to construct/collect/verify much of this information. The filing template under the new standard should require increased transparency. This more open format would encourage a full public review of the incentives of the various parties filing opinions on the desirability of approving the merger/acquisition.

It is also important that the Board connect the "positive benefits" test to the approval criteria set out in the merger approval statute. The companies under the

new standard should have to specifically provide quantitative measures of the impacts on each of statutory criterion.

In the past, most merger cases before the Board have been settled and ultimately approved with conditions by the Board. It would be in the public interest to require that prior to final Board review, all settlements be subject to a public vetting and include a recalculation of the estimated benefits and costs that would result from the negotiated settlement. This would assure that the public is aware of the new deal and that the settlement meets the "positive benefits test" and can then move to the Board for final review.

Finally, the Board should require that all petitions for merger/acquisition approval contain a certification that the resultant new corporation would have in place adequate protections to insulate the New Jersey utility from negative financial spillovers of related companies or that they have the capability of implementing a ring-fencing of the NJ utility under conditions of "imminent harm" based on publicly available information.

In conclusion, consolidations will continue in the electric and gas industries. These consolidations will increase the complexity of State regulation and make it more critical for State regulators to be prepared for situations where their regulated utilities and ratepayers could be harmed by the actions of their holding company or related subsidiaries. The new wave of consolidations should be dealt with under a new and strengthened standard of review. Adoption of the "positive benefits" test and associated filing improvements should begin the enhanced scrutiny of mergers/acquisitions in New Jersey.

RESPONSE: The Board appreciates these comments in support of the rules. However, the comments propose measures above and beyond the scope of this rulemaking. In particular, although a requirement of a specific quantitative estimate of costs and benefits has merit, the Board is concerned that it might unduly burden the regulatory process. The Board considers the review of these kinds of filings to require a degree of certainty, which is provided in the existing rule proposal, but also a degree of flexibility in recognition that the analysis to be performed has variables which can be judgmental and predictive in nature. Having said this, the Board will consider the suggestions offered as it continues to evaluate the evolving regulatory environment, including the need for further rulemaking.

3. COMMENT: (NJCA) We support the proposed amendments to N.J.C.A. 14:1-5.14 and applaud the Board's efforts to codify a "positive benefits" standard for review of petitions concerning utility mergers, consolidations, acquisitions and/or changes in utility control. Establishing this standard through a rule making procedure, rather than continuing to evaluate such petitions on a case-by-case basis, will ensure that all New Jersey customers have the significant benefits of such a standard and that future petitioners understand that they will be required to prove that their proposed transactions meet this threshold prior to filing such petitions before the Board. Having said this, the proposal at N.J.A.C 14:1-5.14(c) should be changed to more clearly state that the petitioners shall have the burden of proving to the Board, by a preponderance of the evidence, that the effects

of a proposed merger, consolidation, acquisition and/or change in control will positively effect the statutory criteria in N.J.S.A. 48:2-51.1 as well as the State of New Jersey. The language should be modified as follows (differences from the rule proposal are underlined):

> (c) The Board shall not approve a merger, consolidation, acquisition and/or change in control unless it is satisfied that net positive benefits in the areas of competition, rates of the ratepayers affected by the acquisition, the employees of the affected utility, the provisions of safe and adequate service at just and reasonable rates and to the State of New Jersey will be achieved.

We recommend deletion of the phrase "at a minimum, that there are no adverse impacts on any of the criteria delineated in N.J.S.A. 48:2-51.1" as that has generally been considered the description of a "no harm" standard and is confusing given that the Board's intent is to adopt a positive benefits standard. A "net" positive benefits standard would capture the Board's intention to only approve utility mergers, consolidations, acquisitions and/or changes in control when the Board is satisfied that positive benefits from such petitions outweigh whatever risks may be identified in such applications.

RESPONSE: The Board appreciates these comments in support of its rules. With respect to the suggested language changes, the Board believes that its rule proposal ensures greater overall positive benefits than a "net" positive benefits rule as suggested would provide. The Board's rule makes clear that positive benefits must flow to customers and the State of New Jersey and, at minimum, that there are no adverse impacts on competition, rates, employees and the provision of safe, adequate and proper service (the statutory criteria in N.J.S.A. 48:2-51.1). Conversely, a "net" positive benefits standard would allow for the possibility that significant adverse impacts to one or more of the statutory criteria exist, but significant positive benefits could outweigh these negatives. The Board believes it to be more appropriate in establishing a positive benefits standard to set what is essentially a "no harm" floor for each of the statutory criteria in N.J.S.A. 48:2-51.1 and a requirement of positive benefits on top of that floor rather than to allow for the possibility of adverse impacts to one or more of the statutory criteria, possible under the commenter's suggested "net" positive benefits standard of review. If the commenter intended that a positive benefits standard be applied to and required for each of the four statutory criteria in N.J.S.A. 48:2-51.1, the Board continues to believe that the rule as drafted more appropriately balances the interests of the regulated entities with the interests of the ratepayers and the State of New Jersey as a whole.

4. COMMENT: (RPA) Protection of New Jersey ratepayers is of paramount importance during all proceedings involving the merger of any New Jersey utility. We support, and indeed welcome, the Board's proposed amendments to N.J.A.C. 14:1-5.14. The RPA fully supports regulation of all forms of mergers, changes in control, consolidations, and/or acquisitions that may impact the New Jersey regulated utilities. The proposed rule amendments are especially necessary in light of the recent repeal of the Public Utility Holding Company Act of 1935 (PUHCA) and subsequent enactment of the 2005 Energy Policy Act by the Federal government.

Moreover, the proposed positive benefits standard of review is a natural extension of the BPU's decisions in the two most recent energy merger cases to review each of those petitions under a positive benefits standard. *See I/M/O Public Service Electric and Gas Co. and Exelon Corporation for Approval of a Change in Control of Public Service Electric and Gas Co., and Related Authorizations,* BPU Docket No. EM05020106, Order dated November 9, 2005 at 25; *I/M/O NUI Utilities, Inc. d/b/a Elizabethtown Gas Company and AGL Resources for Authority Under N.J.S.A. 48:2-51.1 and N.J.S.A. 48:3-10 of a Change in Ownership and Control*, BPU Docket No. GM04070721, Order dated November 17, 2004 at 6.

The Board's decision to delineate a positive benefits standard of review is not only a natural progression from the Board's recent decisions, but has several distinct advantages over deciding standards of review for merger petitions on a case-by-case basis. Adopting a positive benefits standard of review regulation should facilitate the regulatory process before the Office of Administrative Law, and ultimately the Board. Merger proponents will be well aware in advance of the burden required of them for merger approval and will have the opportunity to prepare their petitions and present their cases accordingly. Concrete establishment of the positive benefits standard will also assist other parties to the ensuing regulatory proceeding, including Board Staff and the RPA, in development of a comprehensive record of the case and, if applicable, during settlement negotiations. Moreover, the positive benefits standard will help prevent merger petitioners from making vague representations to the Board of anticipated improvements to service quality, rates, employees, etc. during the merger approval process, while avoiding substantiation of these purported benefits. Positive benefits as a prerequisite to a merger approval is especially warranted in light of post-merger labor relations and reliability problems this State has endured.

RESPONSE: The Board appreciates these comments in support of its rules.

COMMENT: (RPA) The Board should further amend N.J.A.C. 14:1-5.14(c) so that the positive benefits that are required to flow to ratepayers be substantial. Absent such a requirement, merger proponents may insist that a negligible benefit satisfies this requirement and that the rule could be distorted to the point that it becomes practically indistinguishable from a no harm standard of review. We suggest the following (differences from the rule proposal are underlined):

(c) The Board shall not approve a merger, consolidation, acquisition and/or change in control unless it is satisfied that <u>substantial</u> positive benefits will flow to customers and the State of New Jersey and, at a minimum, that there are no adverse impacts on any of the criteria delineated in N.J.S.A. 48:2-51.1. <u>In order for a merger proponent to satisfactorily demonstrate substantial positive benefits, the Board must be satisfied that, at minimum, the benefits to the criteria delineated in N.J.S.A. 48:2-51.1, when considered in the aggregate, will be in the public interest.</u>

RESPONSE: With respect to the suggested language changes, the Board appreciates the position of the commenter but believes that the existing rule language more appropriately discharges the Board's obligation to balance the

interests of the public utility with the interests of the ratepayers and the State of New Jersey as a whole. Moreover, the Board considers the review of these kinds of filings to require a degree of certainty, which is provided here, but also a degree of flexibility in recognition that the analysis to be performed has variables which can be judgmental and predictive in nature. See In the Matter of the Application of New Jersey Bell Telephone Company for Approval of its Plan for an Alternative Form of Regulation, 291 N.J. Super. 77, 89 (App. Div. 1996) (noting that courts are bound to recognize and respect administrative agency's substantive expertise, especially on questions that are primarily of judgmental or predictive nature).

As to the suggestion that the language in section (c) be modified to require a showing of "substantial" positive benefits because of a concern that, absent such a requirement, merger proponents may insist that a negligible benefit satisfies the requirement, the existing rule language affords all parties to a merger-type proceeding with the flexibility to make their respective cases. Moreover, the burden of proof by a preponderance of the evidence rests squarely with the petitioners. The Board remains comfortable that its existing rule language will ensure that sufficient positive benefits flow to ratepayers and that if the record and the arguments of the parties demonstrates that positive benefits are too "negligible," ample justification will exist for the Board to deny the application should it deem it appropriate to do so.

COMMENT: (RPA) The Board should amend the burden of proof in N.J.A.C. 14:1-5.14(d) to a clear and convincing evidence standard. Such a heightened burden, while merger petitioners may find it inconvenient during the regulatory process before the Board, is both appropriate and necessary given the continuous impact, and irreversible nature, of the Board's approval of any given merger petition. We suggest the following (differences from the rule proposal are underlined):

(d) The petitioners seeking merger, consolidation, acquisition and/or change in control of a public utility shall have the burden of proving to the Board, by clear and convincing evidence, that the requirements of this section are met.

The use of a clear and convincing standard in Title 14 would not be without precedent. Under N.J.A.C. 14:10-11.5(f)(4), anti-slamming regulations for telephone service, upon receipt of a complaint of an unauthorized telecommunications service provider (TSP) change, the Board requires the accused unauthorized TSP to produce clear and convincing evidence of a valid authorized TSP change.

RESPONSE: With respect to the suggested language changes, the Board appreciates the position of the commenter but believes that the existing rule language more appropriately discharges the Board's obligation to balance the interests of the public utility, its investors and shareholders, with the interests of the ratepayers and the State of New Jersey as a whole. Moreover, the Board considers the review of these kinds of filings to require a degree of certainty, which is provided here, but also a degree of flexibility in recognition that the analysis to be performed has variables which can be judgmental or predictive in nature. See In the Matter of the Application of New Jersey Bell Telephone Company for Approval of its Plan for an Alternative Form of Regulation, 291 N.J. Super. 77, 89 (App. Div. 1996) (noting that courts are bound to recognize and respect administrative agency's substantive

expertise, especially on questions that are primarily of judgmental or predictive nature).

The suggestions that the language in section (d) be modified to require petitioners to prove their case by "clear and convincing" evidence, as opposed to a preponderance of the evidence does not, in the Board's view, sufficiently balance the interests at stake in these proceedings. Moreover, these proceedings are frequently judgmental or predictive in nature because the parties do not, for a fact, know what a merged entity will look like or how it will perform prior to consummation of the merger, the acquisition or the change in control. Too stringent a requirement would likely preclude approval of all mergers, consolidations, acquisitions and/or changes in control. A "preponderance of the evidence" standard more appropriately balances the competing interests and affords the Board the proper regulatory flexibility.

COMMENT: (RPA) N.J.A.C. 14:1-5.14(a)(3) should be clarified to explicitly include spin-offs and divestitures. We suggest the following: "the acquisition of a public utility of New Jersey and/or a change in control of the public utility, <u>including spin-offs and divestitures.</u>

RESPONSE: The Board continues to believe that the proposed language is sufficient to ensure the appropriate review of these types of proceedings. To the extent that a change in control of a public utility is achieved through a spin-off or divestiture, the rule would clearly apply. The Board will certainly consider this comment should it deem it to be appropriate for future rulemaking.

5. COMMENT: (SJG) We support the efforts of the Board to clarify the conditions under which a merger, consolidation, acquisition and/or change in control will be approved. The proposed regulation will specify what the Board will require for such transactions in the future. The proposed regulation will establish the "rules-of-the-game" so that all parties will be aware of these rules. Consistent with the proposed regulation, no such transaction should be approved unless there is a showing of positive benefits flowing to the customers within the State of New Jersey. This is particularly important in an era when so many New Jersey utilities have been acquired by out of state entities. Moreover, we believe that this Board is correctly concerned with impacts upon the rates of customers, impacts on employees, and impacts on the provision of safe and adequate utility service at just and reasonable rates. The proposed regulation will add an additional layer of protection for utility customers and employees within the State of New Jersey.

RESPONSE: The Board appreciates these comments in support of the rules.

6. COMMENT: (Verizon-NJ) In change of control proceedings, the Board has typically applied a "no harm" standard and far less often applied a "positive benefits" standard. Moreover, the Board has consistently found that the appropriate standard of review should be determined on a "case-by-case" basis, depending on

the specific circumstances of the proposed transaction. The proposed amendments would *require* the Board to apply a "positive benefits" standard in all change of control proceedings. The proposed amendments should be rejected because they would unnecessarily deprive the Board of the discretion and flexibility that it has previously enjoyed and that is the hallmark of reasoned agency decision-making. Circumstances could arise where the Board would prefer not to require a petitioner to demonstrate specific "positive benefits." For example, if Utility A is wholly owned by Holding Company B that is wholly owned by Holding Company C, the consolidation of Companies B and C would have no effect on customers or the State. Under these circumstances, it would be unreasonable and administratively inefficient to require the petitioners to introduce affirmative evidence of a positive benefit.

In addition to unnecessarily constraining the Board's exercise of its informed discretion, the imposition of a mandated "positive benefits" standard may undermine the ability of companies to enter transactions or reorganizations that make business sense but do not produce immediate, measurable "positive benefits." Companies should not be prohibited from entering into such transactions. Particularly in competitive industries, such as the telecommunications marketplace, companies should, to the greatest extent possible, be permitted to make their own decisions regarding how best to meet competitive challenges and their customers' needs.

The Board itself has made clear that the "positive benefits" standard is not appropriate in every circumstance. This is likely the reason why the statutes requiring the Board's approval of a merger, consolidation or change in control do not require the Board to apply a specific standard of review. The Legislature delegated the determination of the appropriate standard of review to the Board, presumably so that the Board could exercise its discretion based upon the specific facts and circumstances of each proceeding.

RESPONSE: The Board continues to believe that implementing a "positive benefits" review of mergers, consolidations, acquisitions and/or changes in control in the manner codified in this rule appropriately balances the interests of all interested parties while maintaining the Board's regulatory flexibility. Under the new rule, the Board will continue to be able to exercise its discretion to evaluate the specific circumstances of each filing before it for adjudication and to consider the appropriate positive benefits necessary to justify approval. The Board will ensure that ratepayers and the State of New Jersey as a whole benefit from the proposed transaction.

COMMENT: (Verizon-NJ) If the Board determines that the proposed rules should incorporate the "positive benefits" standard, the Board should apply this standard only to companies that are subject to traditional rate base, rate of return regulation. Specifically, the proposed sub-section (c) should be amended as follows (differences from the rule proposal are underlined):

> (c) <u>For utilities that are subject to rate base, rate of return regulation</u>, the Board shall not approve a merger, consolidation, acquisition and/or change in control unless it

is satisfied that positive benefits will flow to customers in the State of New Jersey and, at a minimum, that there are no adverse impacts on any of the criteria delineated in *N.J.S.A.* 48:2-51.1.

Companies subject to plans of alternative regulation, as opposed to rate base, rate-of-return regulation, operate in a more competitive environment, and therefore should be given as much flexibility as possible to adapt to changing market conditions. Imposing a "positive benefits" standard on all transactions involving these companies would unnecessarily interfere with their ability to compete and succeed in the competitive marketplace. Further, because the rates for these companies are not based upon cost plus ratemaking, customers are shielded from increased rates attributable to increased costs. In a competitive market, there is no reason to require a "positive benefit" standard because economic risks associated with mergers are borne by the company rather than customers. Even if this were not the case, customers would be sufficiently protected by the Board's application of the "no harm" standard.

RESPONSE: With respect to the commenter's suggested modifications to section (c) of the rule, the Board remains committed to its statutory obligations with respect to all public utilities, including telecommunication companies and other public utilities not operating under traditional rate base, rate of return regulation. Moreover, while maintaining the ability to consider the individual circumstances of each filing, which may include the competitive or non-competitive nature of services provided by the entity at issue, the Board remains committed to a pre-established codified approach to merger review and believes that uniformity along with the ability to consider the circumstances of each particular filing outweighs the commenter's argument that non rate base rate of return companies warrant different treatment. The Board remains particularly concerned about preserving its ability to discharge its statutory obligations given the significant level of consolidation taking place in the utility industry, including the telecommunications industry. The proposed rule will assist the Board in ensuring that public utilities in the State remain vibrant and healthy. Moreover, a positive benefits standard will help ensure that public utilities remain open to innovation in order to promote economic growth and to provide safe, adequate and proper service to the ratepayers of New Jersey.

Federal Standards Statement

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. require State agencies that adopt, readopt or amend State rules that exceed any Federal standards or requirements to include in the rulemaking document a Federal Standards Analysis. N.J.A.C. 14:1-5.14 is not promulgated under the authority of, or in order to implement, comply with or participate in any program established under Federal law or under a State statute that incorporate or refers to Federal law, Federal standards, or Federal requirements. Accordingly, Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. do not require a Federal Standards Analysis for this adoption.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks *thus*; deletions from proposal indicated in brackets with asterisks *[thus]*:

14:1-5.14 Petitions for approval of a merger, consolidation, acquisition and/or change in control; standard of review

(a) A petition for approval of any of the following shall conform to the provisions of N.J.A.C. 14:1-4 and N.J.A.C. 14:1-5.1 through 5.4 and 5.9 to the extent applicable:

1. A merger or consolidation of one public utility of New Jersey with that of another public utility;
2. A merger or consolidation of one public utility of New Jersey with a parent holding company of another public utility or with any other corporate or business entity; or
3. The acquisition of a public utility of New Jersey and/or a change in control of the public utility.

(b) A petition for approval of any of the actions listed at (a) above shall contain in the petition, or as attached exhibits, the following information:

1. A copy of the agreement of merger, consolidation, acquisition and/or change in control;
2. Copies of corporate resolutions of the stockholders of each of the corporations authorizing the transaction;
3. Copies of recent balance sheets of each company and a pro forma balance sheet of the continuing company;
4. Copies of recent income statements of the operation of each of the companies involved and a pro forma income statement of the continuing corporation, in sufficient detail;
5. Copies of certificates of incorporation of each corporation to be merged, consolidated, acquired and/or changed and amendments thereto, if not heretofore filed with the Board;
6. The total number of shares of each of the various classes of capital stock proposed to be issued, if any, by the surviving corporation; the par or stated value per share; and the total amount of new capital stock to be issued;
7. The percentage, and the manner in which, if any, the presently outstanding capital stock of the corporations involved will be exchanged for the new stock of the surviving corporation;
8. Whether any franchise cost is proposed to be capitalized on the books of the surviving corporation, and, if so, the reasons therefor, and in what manner and over what period the items are proposed to be amortized;
9. The names and addresses of the new officers, directors and principal stockholders and the number of shares to be held by each in the surviving corporation;
10. The various benefits to the public and the surviving corporation which will be realized as the result of the merger, consolidation, acquisition and/or change in control;
11. Proposed changes, if any, by the surviving corporation, in company policies with respect to finances, operations, accounting, rates, depreciation,

operating schedules, maintenance and management affecting the public interest;

12. Proof of service of notice of the proposed merger, consolidation, acquisition and/or change in control to the public, the municipalities being served by the companies to be merged, consolidated, acquired and/or changed, and the public utilities serving in the area, pursuant to N.J.A.C. 14:1-4.5;
13. Proof of compliance with rules, regulations and statutes requiring approval from other State and Federal regulatory agencies having jurisdiction in the matter; and
14. A statement of the fees and expenses to be incurred in connection with the merger, consolidation, acquisition and/or change in control and the accounting disposition to be made thereof on the books of the surviving corporation.

(c) The Board shall not approve a merger, consolidation, acquisition and/or change in control unless it is satisfied that positive benefits will flow to customers and the State of New Jersey and, at a minimum, that there are no adverse impacts on any of the criteria delineated in N.J.S.A. 48:2-51.1.

(d) The petitioners seeking merger, consolidation, acquisition and/or change in control of a public utility shall have the burden of proving to the Board, by a preponderance of the evidence, that the requirements of this section are met.